No. 91-995

*IN THE*

# *Supreme Court of the United States*

*October Term, 1991*

ROBERT J. DEL TUFO, Attorney General of New Jersey and C. GREGORY STEWART, Director, New Jersey Department of Law and Public Safety, Division on Civil Rights,

*Petitioners,*

vs.

THE IVY CLUB, a New Jersey Corporation,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

May a party, who files a claim in federal court following a state administrative agency's determination that the federal constitution does not preclude the agency's exercise of jurisdiction, return to federal court to litigate its federal claims after the completion of the state court proceedings in which it specifically refrains from raising its federal claims and its federal claims are not resolved by a state court.

## LIST OF PARTIES

Petitioner's list of parties to the proceeding below is complete.

Respondent The Ivy Club has no parent companies, subsidiaries, or affiliates to list pursuant to *Rule* 28.1.

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## STATEMENT OF THE CASE

The Ivy Club, Respondent herein, was founded in 1879. It is a social eating club with an active membership of less than 80 undergraduate students at Princeton University and approximately 1500 inactive graduate members who formerly attended Princeton University. Although Ivy has had a single-sex membership for more than 100 years, it is now coed. Although its undergraduate members are comprised of Princeton University students, Ivy is legally, financially and operationally independent from Princeton University. Indicia of Ivy's status as a private social organization whose membership's associational preferences should be protected by the First and Fourteenth Amendment of the United States Constitution include, but are not limited to, membership control over the club, its facilities and its finances; oversight by the club's Board of Governors; a highly selective membership process; club facilities which are not open to the public and personnel solely employed by Ivy.

Ivy instituted its federal suit against Petitioners (the State) in February, 1986, alleging violation of its federal constitutional rights of privacy, free association and due process. Prior to filing, Ivy had been a respondent in a state administrative proceeding commenced by Defendant-Intervenor Sally Frank (Frank). Frank alleged among other things in the state administrative proceeding that Ivy was a public accommodation within the meaning of the New Jersey Law Against Discrimination.

In early 1979, the New Jersey Division on Civil Rights (Division) refused to accept Frank's first complaint because the Division did not have jurisdiction over Ivy, a distinctly private entity. In late 1979, the Division processed a second complaint by Frank. After a two year investigation the Division dismissed Frank's complaint for lack of jurisdiction due to Ivy's distinctly private status. Frank appealed the dismissal to the Appellate Division of the New Jersey Superior Court which remanded it back to the Division on Civil Rights for a trial-type hearing on the issue of jurisdiction, specifically not ruling on the merits.

Thereafter, as a respondent in an administrative agency's investigative fact-finding proceeding, Ivy presented to the Director of the Division, arguments based on Ivy's right of privacy and free association contesting the Division's jurisdiction. Although witnesses were presented to the Division, they were never sworn. Documents numbering thousands of pages were "dumped" into the record by Frank. None of the documents submitted were ever tested for accuracy, materiality or relevancy, many were not specifically identified. The Director issued a Finding of Probable Cause which included a finding of jurisdiction. Petitioners Appendix F, at page 125 (hereinafter cited as P. App. F at 125a). The Director later issued an Order of Partial Summary Decision on Jurisdiction reaffirming her finding of jurisdiction contained in her prior Finding of Probable Cause. Upon entry of that Order, Ivy filed its federal complaint.

By Order dated June 9, 1986, the U.S. District court abstained under *Railroad Commission of Texas v. Pullman*, 312

U.S. 496, 61 S. Ct. 643, 85 L. Ed. 2d 971 (1941); Ivy's federal action was stayed until the New Jersey courts had clarified the application of the New Jersey Law Against Discrimination to Ivy. P. App. D at 76a. Frank then resumed the state proceedings before the state agency. Ivy subsequently reserved its federal claims under *England* at the administrative agency and state court levels and never argued lack of jurisdiction based on freedom of association until returning to federal court. After the Division completed its proceedings, Ivy appealed the Division's decisions on jurisdiction, damages and remedies in state court. In 1988, the New Jersey Appellate Division, hearing the case for the second time, remanded the case back to the Division for a plenary hearing (just as it had ordered five years earlier). It did not address any federal claims. After a subsequent clarification by the Appellate Division at the New Jersey Supreme Court's request pursuant to a limited remand, (wherein the Appellate Division reiterated the need for a plenary hearing), the New Jersey Supreme Court took discretionary jurisdiction. After its review, the New Jersey Supreme Court reinstated the Division's order as to damages and remedy holding that Ivy was subject to the New Jersey Law Against Discrimination. The New Jersey Supreme Court did not adjudicate any federal claims. It determined the State had jurisdiction over Ivy not because Ivy was a public accommodation, but because a symbiotic relationship existed between Princeton and Ivy: Princeton University provided student members - Ivy fed them. No other factors were considered relevant.

After the New Jersey Supreme Court rendered its decision, Ivy returned to U.S. District Court to reopen and

reinstate Ivy's 1986 case. The District Court granted Ivy's motion to reinstate its case to the docket. The Third Circuit affirmed the District Court decision, and subsequently denied the State's request for a rehearing *en banc*. This Court denied an extension of time for Petitioners to file their Petition for a Writ of Certiorari.

After 12 years in litigation, no hearing was ever held on the issue of jurisdiction, nor on Ivy's claim to federally protected freedom of association. After 12 years in litigation, no court ever adjudicated Ivy's federal right of freedom of association. Ivy seeks to proceed with its case in federal district court. The State and Frank continue their attempts to avoid a hearing and a court review of Ivy's federal claims concurrently with this Petition. Both have pending summary judgment motions before the District Court seeking dismissal of Ivy's claims.

## REASONS FOR DENYING THE WRIT

The decision below does not conflict with the decisions of this Court regarding the right to have federal claims adjudicated by federal court. The Third Circuit was in compliance with this Court's abstention decisions in affirming the District Court's reopening of Ivy's case based on a prior *Pullman* abstention and *England* reservation. (Point I).

The procedural issue presented at this stage of the case is a unique one unlikely to be seen again. The unusual procedural posture led the Third Circuit to state. "It is hardly

surprising that no court has encountered the anomalous situation presented here. That no court has decided what should happen under these unique circumstances does not mean that we can not, or should not, decide the case according to the dictates of justice". *Ivy v. Edwards*, 943 F. 2d 270, 283 (3rd Cir. 1991) P. App. A at 27a.

In resolving this case, the Court below determined that the unreviewed agency decision would have no preclusive effect on the district court litigation. (Point II).

This Petition only continues to delay Ivy's efforts to have its important federal rights adjudicated. More years will be added to the 12 years of litigation without holding a hearing on Ivy's substantive federal rights. (Point III).

## POINT I

### THE THIRD CIRCUIT CORRECTLY AFFIRMED THE REOPENING OF IVY'S FEDERAL CASE BASED ON THE DISTRICT COURT'S PRIOR ABSTENTION UNDER *PULLMAN* AND IVY'S RESERVATION UNDER *ENGLAND*.

When this matter was before the District Court in 1986, the Court determined that it had subject matter jurisdiction, but chose to abstain under *Pullman*, 312 U.S. 496 (1941). *Tiger Inn v. Edwards, et al.*, 636 F. Supp. 787 (D.N.J. 1986). P. App. D at 67a.

The *Pullman* abstention is generally appropriate where the state court's resolution of an unsettled question of state law may moot or change the analysis of the federal constitutional issue. *Georgevich v. Strauss*, 772 F. 2d 1078, 1089 (3d Cir. 1985) (in banc) *cert. denied*, 475 U.S. 1028 (1986); *Heritage Farms, Inc. v. Solebury Township*, 671 F. 2d 743, 746 (3d Cir.), *cert. denied*, 456 U.S. 990 (1982).

Because the right of a litigant to choose a federal forum and the duty of the federal court to adjudicate claims properly brought before it are so fundamental, a party forced to litigate in state court may reserve its federal claims for federal adjudication. *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964).

Subsequent to the District Court's abstention order, Ivy clearly and unequivocally reserved its federal constitutional issues in state court at both the Appellate Division and State Supreme Court levels pursuant to *England*.[1] The Third Circuit found unequivocally that Ivy's constitutional claims were never adjudicated other than at the state administrative level and that the New Jersey courts appeared to acquiesce to Ivy's reservation of its right to litigate its federal claims in federal court. *Ivy v. Edwards*, 943 F. 2d. 270, 281, P. App. A at 22a.

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[1]Ivy also reserved its federal claims for federal adjudication at the next proceeding of substance in the state proceedings which was an administrative hearing on the issues of damages and remedy on July 29, 1986.

The court in *England* acknowledged "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." 375 U.S. at 415. Since the *Pullman* abstention was contemplated only to postpone and not to abdicate federal jurisdiction, it is appropriate that Ivy's federal claims be adjudicated in federal court upon completion of the state court proceedings.

Under the *England* doctrine, if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then whether or not he seeks direct review of the state decision in the Supreme Court, he has elected to forego his right to return to the District Court. 375 U.S. at 419. In the within case, Ivy has not instituted any state proceeding in which it raised and litigated his federal claims, nor has the state courts decided its federal claims. In fact, Ivy never invoked the jurisdiction of the state agency as argued by the State; the jurisdiction of the state agency was the very issue Ivy was contesting in the state proceedings. See *Peduto v. City of North Wildwood*, 878 F. 2d 725 (3d Cir. 1989) (*England* was found to have no relevance where the federal plaintiffs "invoked the jurisdiction of the state court in the first instance" (emphasis added) by filing in State court).

While Judge Cowen expressed concern in his 1986 opinion over whether Ivy had to reserve its federal claims for federal adjudication prior to filing the within action to preserve its

right to return to federal court, he cited no case law requiring this. The decision pointedly did not resolve this issue.

The rationale behind the *England* reservation allows a litigant his initial district court determination to which the litigant is entitled in the federal courts, rather than seeking federal review only through U.S. Supreme Court review. The Court in *England* found Supreme Court review an inadequate substitute for district court action even where it is available as a matter of right.

In accordance with the precepts set forth by the Supreme Court in *England*, Ivy reserved its federal issues for determination by the federal courts, while exposing its federal claims to the state courts only to comply with *England*.

Only after the District Court considered this case in 1986 did the Supreme Court consider *Ohio Civil Rts Comm. v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 106 S. Ct. 2718, 91 L. Ed. 2d 512 (1986) (involving *Younger* abstention applied to administrative proceedings initiated by a private plaintiff) and subsequently *Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987) (involving unwarranted determination of federal constitutional questions a basis for obtaining under *Younger*). The Third Circuit found that in retrospect, with the added guidance from *Dayton* and *Pennzoil*, *Younger* doctrine would have been appropriate. 943 F. 2d 280.

However, without these cases, the District Court in 1986 was persuaded instead that this was a classic situation for *Pullman* abstention. Abstention under *Pullman* does not

terminate federal jurisdiction like *Younger*, but merely postpones the exercise of federal jurisdiction. A *Pullman* abstention, coupled with reliance on it by Ivy invoking an *England* reservation and the state courts acquiescence to the reservation by refraining from a decision on the federal claims warrants a balancing of the equities. *Ivy*, 943 F. 2d 270, 281, P. App. A at 24a. Ivy was put in a "catch-22" situation as a result of the District Court's *Pullman* abstention. The Third Circuit's decision is thus not in conflict with *Younger*, but rather recognizes the distinction between *Younger* and *Pullman* and the unique procedural posture of this case.

As is evident by the Appellate Division decision of 1983, *Frank v. Ivy Club, et al.*, A-2378-86T3, slip. op. (App. Div. 1983), the Appellate Division decision of 1988, *Frank v. Ivy Club, et al.*, 228 N.J. Super. 40 (App. Div. 1988) and the New Jersey Supreme Court decision of 1990, *Frank v. Ivy Club, et al.*, 120 N.J. 73 (1990) none of the state courts addressed any federal constitutional issues. While Tiger Inn (a participating party-respondent in the state proceeding and plaintiff in the case consolidated herewith) did raise and argue vigorously its federal constitutional claims, certainly, Ivy, a separate and distinct party was not compelled to do the same.

This failure of any court to address the federal issues was a clear concern of Judge Lifland in granting Ivy's motion to reinstate its complaint and to the Third Circuit in affirming the District Court. The Third Circuit recognized that the New Jersey Supreme Court chose not to address any of the parties' federal constitutional rights (P. App. A at 22a-23a) - especially in the face of Ivy's clear and unequivocal reservation. Thus,

there was never a full litigation of any party's federal constitutional rights. P. App. at 22a. If nothing else, *England* assures a party of this, its purpose being to give deference to a state court decision only on issues that are fully and fairly litigated. See *Wicker v. Board of Education of Knott County Ky*, 826 F. 2d 442, 450 (6th Cir. 1987), (allowing litigant to return to federal court after abstention even more important when state court silent) Nor was there any clear waiver by Ivy of the right to have federal issues heard in a federal forum. To argue, as the State and Frank attempt to do, that the Supreme Court decision constitutes a full review and determination of the federal issues is unsupportable. It misreads both the New Jersey Supreme Court decision and the May 26, 1987 Division on Civil Rights order which the Court reinstated. The New Jersey Supreme Court's reference to First Amendment arguments which were put before the Division was merely part of the Court's recitation of facts and procedural history. It is certainly not a holding of the Court nor an affirmance of the Director's determinations regarding Ivy's constitutional rights, nor does not rise to the level of being classified as full consideration of federal constitutional issues.

Reinstatement of the Division's May 26, 1987 order does not represent review and affirmance by the New Jersey Supreme Court of the Division's determination of Ivy's federal claims as asserted by the State. The May 26, 1987 Division on Civil Rights order was the result of a hearing solely on the issues of damages and remedies and was not the Division's determination of jurisdiction.

## II. THE THIRD CIRCUIT CORRECTLY RESOLVED THE PRECLUSION ISSUE IN PLAINTIFF'S FAVOR IN ITS AUGUST 21, 1991 OPINION.

The Third Circuit correctly resolved the issue of preclusion in its August 21, 1991 opinion. The court explicitly stated that it was "unnecessary to remand to the District Court to decide the preclusive effect to which the Division's fact-finding would be entitled in State Court." *Ivy Club v. Edwards*, 943 F. 2d 270, 284 (3rd Cir. 1991), P. App. A at 29a. It distinguished court fact-finding from unreviewed administrative fact-finding. The Third Circuit gives preclusive effect only to the factual findings of the New Jersey Supreme Court. 943 F. 2d at 283, P. App. A at 29a-30a.

The Court dealt with 28 U.S.C. § 1738 by asserting that the preclusion barriers apply to state court decisions - as opposed to unreviewed state administrative decisions. 943 F. 2d at 284, P. App. A at 30a. See also *University of Tennessee v. Elliot*, 478 U.S. 788, 794, 92 L. Ed. 2d 635, 106 S. Ct. 3220 (1986). Federal courts can only give a state administrative agency's fact-finding the same preclusive effect to which it would be entitled in the state court. The Division's fact-finding was entitled to no preclusive effect with respect to the federal issues in State Court. Since the New Jersey State Courts accepted Ivy's *England* reservation, Ivy's Federal Constitutional claims were not to be decided. They were saved for federal adjudication. Thus, no preclusive effect could be given to the administrative fact-finding by the State Court. The Third Circuit thus declared that full review of the federal issues by the District Court was permitted.

Ivy is entitled to a full and fair opportunity to litigate its federal claims. The Third Circuit found that Ivy's constitutional claims have not been adjudicated other than at the State administrative level. The New Jersey Supreme Court then affirmed only the order of the administrative body, not the Division's opinion containing the First Amendment discussion. Thus, the Third Circuit found Ivy did not have a full and fair opportunity to litigate its federal issues. As the U.S. Supreme Court (and the Third Circuit) has repeatedly recognized, issue preclusion cannot be applied when a party did not have a full and fair opportunity to litigate an issue. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 480-481, 72 L. Ed. 2d 262, 102 S. Ct. 1883, (1982) reh. den. 458 U.S. 1133, 73 L. Ed. 2d 1405, 103 S. Ct. 20. *Allen v.McCurry*, 449 U.S. 90, 101, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980). Unreviewed State administrative proceedings cannot be considered a sufficient and fair opportunity to fully litigate Ivy's federal claims. *Ivy*, 943 F. 2d at 282, P. App. A at 25a.

Whether Ivy's freedom of association rights were violated certainly was not an issue litigated. Nor were the factual issues of size, selectivity, purpose, policies and congeniality, the characteristics listed in the *Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S. Ct. 3244 L. Ed. 2d 462 (1984), and *Bd. of Dirs. of Rotary Internat'l v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987) opinions as relevant in determining intimate associational rights, ever reviewed by a state court.

While ignoring the test for intimate associational rights set down by the United States Supreme Court, the New Jersey Supreme Court looked to other courts for its test. Three

cases, *Hebard v. Basking Ridge Volunteer Fire Co.*, 164 N.J. Super. 77, 395 A 2d 870 (App. Div. 1978) cert. den. 81 N.J. 294, 405 A. 2d 838 (1979); *Franklin v. Order of United Commercial Travelers*, 590 F. Supp. 255, 260 (D. Mass. 1984); and *Adams v. Miami Police Benevolent Association*, 454 F. 2d 1315 (5th Cir. 1972) cert. den., 409 U.S. 843, 93 S. Ct. 42, 34 L. Ed. 2d 82 (1972) were used by the Division as a basis for its symbiotic relationship test. All of these cases are distinguishable due to the involvement of "state action." There has never been even an allegation in this case that "state action" is involved.

The State court never decided whether or not Ivy was a place of public accommodation nor did it even look at factors relevant to Ivy's constitutional claims. Clearly an organization may be exempted from a state regulation if it can establish the unconstitutionality of a specific application to it. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958); *University Club v. City of New York*, 842 F. 2d 37 (2d Cir. 1988). Ivy seeks a denial of the State's writ so it may proceed with its opportunity to establish this now.

## III. IMPORTANT FEDERAL RIGHTS NEED TO BE ADJUDICATED BY THE DISTRICT COURT WITHOUT FURTHER DELAY.

The protection of associational rights is not new to the federal courts. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), *Griswold v. Conn.*, 381 U.S. 479 (1965), *Roberts v.*

*United State Jaycees*, 468 U.S. 609, 104 S. Ct. (1984), *Moose Lodge v. Irvis*, 407 U.S. 163 (1975), *Evans v. Newton*, 382 U.S. 296 (1966), *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987). These cases recognize certain constitutional rights for freedom of association.

The Third Circuit also recognized the federal government's role as a guarantor of basic federal rights against state power. The court saw Section 1983 as purposely interposing "the federal courts between the states and the people 'to protect the people from unconstitutional action under color of state law', whether that action be executive, legislative, or judicial". *Ivy Club v. Edwards*, 943 F. 2d 270, 277, P. App. A at 13a-14a.

Ivy's right to freedom of association has never been addressed by the state courts despite two (2) Appellate Division and one (1) Supreme Court decisions in 12 years of litigation. The New Jersey Supreme Court made perfectly clear its reasons for reinstating the Division's May 26, 1987 order. *Frank v. Ivy*, 120 N.J. at 110-111, P. App. E at 121a-122a. These reasons were not based on federal constitutional concerns.

It is an unquestioned equitable principle that for a party to waive a substantial right, there must be full knowledge of the right and an intentional surrender. *West Jersey Title & C., Co. v. Industrial Trust Co.*, 27 N.J. 144, 153 (1958). The State's strong aversion to having an adjudicative hearing on this issue causes it to ignore this principle and implores this Court to ultimately find that Ivy is not entitled to have a federal court

rule on its federal constitutional claims. It urges that the Third Circuit should have dismissed on *Younger* grounds and ignored the District Court's initial abstention under *Pullman* and Ivy's subsequent reservations. This, despite the undisputed facts that after the Division asserted jurisdiction over Ivy for the first time (having previously specifically denied jurisdiction) Ivy immediately filed its federal complaint and thereafter, clearly reserved its federal claims. The Third Circuit found that Ivy having sought injunctive relief immediately upon the final decision of the state administrative agency on the question of jurisdiction, and having been the beneficiary of a *Pullman* abstention, should not be deprived of subsequent access to federal court at the conclusion of the state court proceedings in which it refrained from litigating its federal claims and in which the state courts acquiesced. *Ivy v. Edwards*, 943 F. 2d 283, P. App. A at 22a. The district court retained jurisdiction and held out the opportunity for Ivy to return. Ivy's detrimental reliance on this grant of jurisdiction resulted in a loss of its full and fair opportunity to litigate its federal claims in state court. *Id.*

Ivy's members seek to have an adjudication of their First Amendment freedom of association and their constitutionally guaranteed right to privacy. While this case may again come before this court, Ivy is entitled to litigate at the trial level first. This court will then have a record to review.

The freedom of association is often entwined with the constitutionally guaranteed right of privacy. It has been stated that the Constitution secures to an individual a freedom "to satisfy his intellectual and emotional needs in the privacy of its

home." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). Mr. Justice Brandeis stated that constitutionally protected privacy is "as against the Government, the right to be let alone...the right most valued by civilized man". *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion). It will be argued that the right to choose one's social and eating companions involves deeply personal considerations which surely fall within the right of privacy protected by the Constitution.

These constitutional rights have simply have not been addressed by the state courts. The only level at which such associational rights were even considered were at the administrative level. Judge Cowen correctly recognized that the administrative process is not sufficient to adjudicate such matters of federal law. *Tiger Inn v. Edwards*, 636 F. Supp. at 791, P. App. D at 73a-74a. Judge Lifland recognized that in a close decision, a litigant should be entitled to have its federal rights adjudicated by a federal court. The Third Circuit, based on the procedural posture of this case, balanced the equities and found Ivy had the right to have its federal claims adjudicated in federal court. Ivy respectfully requests this Court to do the same by denying the State's Petition for a Writ.

## CONCLUSION

Ivy's complaint, filed in the United States District Court in 1986, was stayed by the Court under the *Pullman* doctrine pending a clarification of state law by the state courts. The related state case has terminated, having been appealed

through the New Jersey Supreme Court, with no judicial review of Ivy's federal rights. By asking this Court to grant its Writ, the State seeks to delay, and attempts to deny, Ivy a judicial review of these most important of federal rights.

Ivy's federal claims deserve judicial review by a trial court without further delay. The District Court and the Third Circuit agreed with this. In it's ruling to reopen this case, the District Court returned to the fundamentals of *England*, to ensure federal constitutional rights their appropriate forum for resolution.

Accordingly, Ivy respectfully requests this Court to deny the State Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: January 22, 1992